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No. ~~385~~ 21

Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, PETITIONER,

versus

TWIN CITY POWER COMPANY AND WILLIAM P. DAUCHY, ITS MORTGAGEE, RESPONDENTS.

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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No. 463

Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, PETITIONER,

versus

TWIN CITY POWER COMPANY AND WILLIAM P. DAUGHY, ITS MORTGAGEE, RESPONDENTS.

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

The Respondents, Twin City Power Company and William P. Daughy, its Mortgagee, pray that the Court deny the petition for certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered August 30, 1954.

OPINIONS BELOW

The opinion of the Court of Appeals (Petition 1a-19a) is reported at 215 F. (2d) 592. The District Court's opinion refusing the motion of the United States to strike (R. 1-21) is reported as *U. S. v. 1523.63 Acres of Land*, 86 F. Supp. 467. Its opinion directing the entry of judgment (R. 67-79) is reported as *U. S. v. 3928.09 Acres of Land*, 114 F. Supp. 719. Its order denying a motion for a new decree (R. 79-83)

is unreported. The Commissioners' report to the District Court is found at (R. 21-67).

JURISDICTION

The judgment of the Court of Appeals (Petition 20a) was entered August 30, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. A. Sec. 1251 (1).

QUESTION PRESENTED

Where concurrent findings of Commissioners, District Court and Court of Appeals have established as a fact that the potential use of the Twin City properties for power purposes was so probable at the time of taking as to affect the market value of the property and the Courts below have awarded judgments for this market value as the "just compensation" required by the Constitution, should this value be denied the landowner because these properties lie along a navigable stream and because they are being taken by the United States for water power and flood control purposes under the Flood Control Act of 1944?

STATUTE INVOLVED

The "Flood-Control Act of 1944", enacted December 22, 1944, 58 Stat. 887, portions of which are quoted in the petition (2-3), is pertinent to the question presented.

STATEMENT OF THE CASE

The United States instituted in the District Court for the Western District of South Carolina three suits taking the lands of the Twin City Power Company for use in connection with its huge Clark Hill hydro-electric and flood control development. Contemporaneously it took the lands of Twin City's wholly owned subsidiary, the Twin City

NOTE: Emphasis has been supplied throughout the brief.

Power Company of Georgia, in proceedings instituted in the Southern District of Georgia. Unless otherwise indicated, Twin City, as used herein, refers to both corporations.

After motions filed by the United States to strike certain defenses were denied (*U. S. v. 1523.63 Acres of Land*, 86 F. Supp. 467, R. 1-21) the issues were referred to Commissioners by each of the two District Courts. The report of May 14, 1953 (R. 21-67) found that the properties of Twin City "were peculiarly adapted for use as a site or as an integral portion of a site for a hydro-electric development by reason of their location in proximity to and along the Savannah River"; (R. 51-52). It found that the sound market value of the 4707 acres of Twin City lands in South Carolina and in Georgia aggregated $1,257,033.00 and allocated this amount among the several tracts on an acreage basis. (R. 59, 60.)

On objections filed by the United States and by Twin City pursuant to Rule 53(e)2, each District Court affirmed the material findings of the Commission and awarded judgments thereon (*U. S. v. 3928.09 Acres*, 114 F. Supp. 719, R. 67-79). Motions for new decrees, filed in each court, were denied. (R. 79-83.)

The Court of Appeals for the Fourth Circuit on August 30, 1954, affirmed the judgment entered in the Western District of South Carolina. (Petition 1a-20a, *U. S. v. Twin City*, 215 F. (2d) 592. Appeals from the judgments entered in the Southern District of Georgia are now pending in the Court of Appeals for the Fifth Circuit.

STATEMENT OF THE FACTS

The essential facts are not in dispute (Petition 4). They have been established by concurrent findings of the Commission, of the District Court and of the Court of Ap-

peals. They may be summarized in these quotations from the opinion of the Fourth Circuit (Petition 3a-6a, 6a-7a) where that Court adopted the findings of the District Court. (R. 81-83, 73):

"The properties of the two Twin City corporations taken by the United States in these actions and in those pending in the Southern District of Georgia, extend some eleven miles along both sides of the Savannah River from Price's Island to Chamberlain's Ferry, embracing some forty-seven hundred acres. Along this distance the Savannah River has a sixty-foot fall and a stream flow exceeding that at most of the hydro developments in Georgia and the Carolinas. At Price's Island on the Twin City properties there was an excellent dam site between spurs with sound foundation rock and ideal clay available for construction purposes.

"Twin City's ownership of a strip of land for a railroad siding to the C. & W. C. Railroad some two miles away, the proximity of nearby transmission facilities, the ownership of a reservoir area free of houses, bridges, railroads and highways were factors materially minimizing construction costs. At the time of taking conditions were favorable for the marketing of power.

"Dams at Price's Island site were economically feasible for use in connection with a sixty, seventy, eighty, ninety or one hundred foot head. Twin City owned practically all of the land needed for the sixty-foot development and therefore an integrated site for such a project. These properties embraced one of the best undeveloped hydro sites in the eastern part of the United States. This land was also useful for hydro-electric purposes in conjunction with up-stream and down-stream properties owned by others. The value of the Twin City lands would have been increased by up-stream developments at Calhoun Falls and

at Hartwell which were under consideration at the time of taking.

"These properties were under constant study for hydro-electric development from the time of the first acquisition for this purpose by Twin City in 1901. It was authorized to build dams in the Savannah River under six Acts of Congress enacted between 1901 and 1919. The Secretary of War and the Chief of Engineers approved its plans, the Federal Power Commission tendered Twin City a preliminary permit in 1926, for a development at Price's Island. From 1926-1932, the Savannah River Electric Company held a Federal Power license to build at Clark Hill and to incorporate the Twin City properties into its development. From time to time other private interests were interested in acquiring these properties for river development. During the twenty-year period immediately preceding these condemnation proceedings the Army Engineers had this stretch of the Savannah under constant study in connection with both private and public hydro-electric development. Finally in 1944, Congress decided that the project should be built by the United States and the Federal Power Commission therefore refused to issue a license for its construction to the private applicant, the Savannah River Electric Company. *Savannah River Electric v. Federal Power Com.*, 164 F. (2d) 408.

"These facts are largely undisputed. *The great weight of the evidence supports the finding that this use for power purposes was so probable at the time of taking as to affect the market value of the property.* The Government, having been attracted to the acquisition of this property because of its suitability for water power development, can hardly deny that the water power potential actually did affect its value in the market.

("The *amount of the award is supported by the preponderance of the evidence.* Three competent and well qualified hydraulic engineers with large experience in this field, after fully considering all of the pertinent factors, testified that in their respective opinions a prudent, competent and well-informed buyer, willing but not compelled to buy, trading with an equally well-informed, competent and willing seller would have paid substantially more than the award for these properties. The commissioners, evaluating all of the evidence, found that a figure, less than these given in these opinions, was just compensation and the two courts confirmed the aggregate of the awards in the companion decrees of August 26, 1953. On reconsideration I am convinced of the correctness of the findings in the decree.

* * *

"All of the properties of Twin City and the entire eleven mile stretch of the Savannah River along which this land lay have been incorporated by the United States in its Clark Hill hydro development for water power purposes as its best and most valuable use. The testimony from both sides shows that *during the entire period from 1901 to the date of taking Congress and all of the interested Federal agencies, without exception or dissent, considered that these properties of Twin City should be developed for water power*, either by private interests or by the United States and either separately or in conjunction with other property."

The finding of the lower courts that the lands of Twin City actually did have this fair market value is one of fact based upon ample evidence and, therefore, not an appropriate question for review by this Court.

REASONS FOR DENYING THE WRIT

1. The Court of Appeals and the District Court correctly held that since the most profitable use of the Twin City properties was in the development of water power and since that use "was so probable at the time of taking as to affect the market value", such use must be given consideration in arriving at the "'just compensation", contemplated by the Fifth Amendment. (Petition 5a, 6a; R. 76, 77, 80, 82). This is in accord with the principles announced in the controlling decisions of the Court. *Olson v. U. S.*, 292 U. S. 246, 255; *U. S., ex rel. TVA v. Powelson*, 319 U. S. 266, 275, 287; *Grand Dam v. Grand Hydro*, 335 U. S. 359.

In the *Olson* and *Powelson cases*, both involving condemnation proceedings by the United States and both concerned with the problem of whether the potential use of the condemned lands, either alone or in combination with other properties, for water power purposes could be considered in arriving at market value and therefore "just compensation", the Court stated that this potential use is to be considered to the full extent that the demand for this use has affected market value. It is true that in the *Olson case* the facts did not show that the potential use for power purposes had affected market value and in *Powelson* there was a reversal because the Court of Appeals had permitted an award measured by potential profits and had treated the grant of the power of eminent domain as compensable property.

In the case at bar there are concurrent findings of the Commission, of the District Court and of the Court of Appeals that this potential use for power purposes at the time of taking was so probable as to affect the market value and therefore to require consideration in fixing just compensation. (R. 51-2, 82; Pet. 5a.)

Because "in a voluntary purchase of this land by the petitioner, as a willing purchaser, from the respondent as a willing and unobligated seller, the value of it as a **power site** inevitably would have entered into the negotiated price", the Court sustained an award to a private landowner of a market value which included potential use for power purposes in *Grand Dam v. Grand Hydro*, 335 U. S. 359.[1] While a Federal Power licensee rather than the United States was the condemnor in the *Grand Dam case*, that difference has no significance since the just compensation guaranteed by the Constitution is for the property taken. The identity of the condemnor is immaterial. *U. S., ex rel. TVA v. Powelson*, 319 U. S. 266, 287; *Boston Chamber of Commerce v. Boston*, 217 U. S. 189, 195; *U. S. v. Causby*, 328 U. S. 256, 261.

2. The right of the Congress to use the *bed* of a navigable stream in the interest of *practical navigation* without compensation to the riparian owner is inapplicable here because the properties taken are all above high water and because the Congress has not, in the Flood Control Act of 1944, attempted to exercise this public easement of passage.

Here the United States has taken the fast lands of Twin City for the construction of a dam extending from the hills of Georgia to the hills of South Carolina. The dam rises more than 130 feet above the bed of the Savannah River. The dam is a complete and absolute obstruction to navigation and no lock or other means of passage is provided. A power house in the dam develops 230,000 K V of hydro-electric power. Both the Clark Hill dam and the thirty-seven mile pond created by it lie principally outside

[1] In the case at bar the District Court, speaking of the award said (R. 77): "This is the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy."

the river bed. Within the bed of the stream itself no power development is possible because neither head nor storage is available. The United States was able to acquire a suitable site only by acquiring Twin City lands above high water. The public easement in the interest of navigation does not extend to lands above high water *U. S. v. Chicago Ry.*, 312 U. S. 592; *U. S. v. Kansas City*, 339 U. S. 799, 804.

Another reason why this public servitude for navigation may not be used by the United States as a vehicle for denying to Twin City the market value of its property is that in the Flood Control Act of 1944 Congress has not attempted to exercise the public easement for navigation with reference to this development in the Savannah River. The pertinent portion of Section 10 (Petition 3) speaks of the "comprehensive development of the Savannah River Basin for *flood control* and other purposes." While the general language of Section 10 speaks of both navigation and flood control, it is apparent that Clark Hill dealt only with the latter.[2] *Savannah River Electric Co. v. Federal Power Commission*, 164 F. (2d) 408. *Cf. United States v. Federal Power Commission*, 345 U. S. 153, 179.

Here the Government condemned and built for flood control and water power purposes. To come within the protection of the navigation servitude there must be a *real*, not a *fancied*, improvement in the interest of navigation. *U. S. v. Gerlach*, 339 U. S. 725, 737; *Ford v. Little*

[2] An examination of House Document 657 (78th Congress) shows that Clark Hill is primarily a power project with some flood control features and no practical navigation benefits (H. D. 657, pp. 3, 4, 11, 38, 49, 64-5, 66). The dam without locks at Clark Hill demonstrates that this is no real navigation improvement. The suggestion in the Petition (Note 1) that the "specific navigation purpose" of Clark Hill was to insure a minimum channel depth of 7 feet in the river below Augusta is negatived by the fact that the project was built to operate on a 25 per cent load factor (Petition 143, H. D. 657, pp. 11, 49, 64-5) so as to meet the peak demands of neighboring electric utilities ("Saluda type" energy, *U. S., ex rel TVA v. Powelson*, 319 U. S. 266, 274). So operated, Clark Hill's fluctuating water releases adversely affect downstream navigation.

Falls Fibre Co., 280 U. S. 369; *International Paper v. U. S.*, 282 U. S. 399; *F. P. C. v. Niagara Mohawk*, 347 U. S. 239.

3. There is no conflict between the decision below and that in *U. S. v. Chandler-Dunbar*, 229 U. S. 53. In the latter case, Congress, by the Act of 1909, determined that the "*whole flow*" of the St. Mary's River (the only outlet for the waters of Lake Superior) "should be devoted exclusively" to "the purposes of navigation." 229 U. S. 66-67. The Court dwelt at length upon the large and growing navigation, both American and Canadian, through Lake Superior and the St. Marys River and arrived at the conclusion that the determination of Congress to devote the entire flow of the river exclusively to navigation was not arbitrary or unreasonable. The Court held, therefore, that there could be no water power value existent in any riparian land since the dominant easement of navigation required the entire flow of the river.

On the other hand, in the *Twin City case* the action of the United States has been exactly the reverse. By the construction of a solid dam extending across the Savannah river valley, it has eliminated navigation in the river at this point completely and has devoted the flow to the development of hydro-electric power in the power house which it erected in the dam.

At another point in the *Chandler-Dunbar* opinion the Court overruled the Government's objection to the "inclusion as an element of value the availability of these parcels of land for lock and canal purposes" since this prospective use "had passed beyond the region of the purely conjectural or speculative" (229 U. S. 76-7). In the *Twin City case* the prospective use for power purposes was so probable as to affect market value. The principle that the potential use of *Chandler-Dunbar* land for canal purposes must be considered in arriving at market value

is the same principle which requires the potential use of *Twin City* land for power purposes to be considered in arriving at its market value. The decision below is not in conflict with *Chandler-Dunbar*. In reality it is supported by that decision.[3]

4. The conflict of the decision below with the Ninth Circuit decision in *Continental Land Co. v. United States*, 88 F. (2d) 104, 111, (1937) and *Washington Water Power Co. v. U. S.*, 135 F. (2d) 541 (1943) affirming *U. S. v. Washington Water Power Co.*, 41 F. Supp. 119, is more apparent than real.

In the *Continental case* there was a factual finding that "there was no reasonable probability of utilizing this land by private capital for water power purposes." Therefore, as the Court held in *Olson v. U. S.*, *supra*, this potential had not affected the market value and could not be considered on the issue of just compensation. It is true that the Court of Appeals there interpreted *Chandler-Dunbar* as forbidding a consideration of potential use for water power where the United States exercises "its dominent right of navigation."

The *Washington Water Power case* followed the dicta in *Continental* when it affirmed the action of the District Court in rejecting a proffer of evidence tending to show adaptability of the property for power purposes. The Court

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[3] The *Chandler-Dunbar* opinion is cited in *Olson v. U. S.*, 292 U. S. 246, at 259, in support of the principle that the potential use of land along a navigable stream in combination with the water, if reasonably probable, is a factor to be considered in arriving at market value in eminent domain proceedings.

It is significant that the United States successfully relied on the *Chandler-Dunbar case* in *U. S. v. River Rouge* (1926), 269 U. S. 411, to support the proposition that riparian rights are property which cannot be taken for public use except on payment of just compensation (70 L. ed. 340-341). It is also significant that it unsuccessfully relied on *Chandler-Dunbar* in an effort to bar recovery for riparian rights in *Grand Dam v. Grand Hydro* (1947), 335 U. S. 359; *U. S. v. Kansas City Life Ins. Co.*, 339 U. S. 799, (1949); *U. S. v. Gerlach*, 339 U. S. 725; and *F.P.C. v. Niagara Mohawk* (1954), 347 U. S. 239.

there placed reliance on the fact that the Washington Water Power Company had acquired these lands after the passage of the Federal Water Power Act of 1920 (41 F. Supp. 129).

These Ninth Circuit decisions were filed prior to the decision of the Court in *Grand Dam v. Grand Hydo, supra* (1947), where a market value including potential water power use was approved; prior to the decision in *U. S. v. Gerlach, supra* (1949), where the Court pointed to the fact that there must be a real navigation purpose to justify a denial of recovery for lands below high water based on the exercise of the navigation servitude; and prior to the decision in *F. P. C. v. Niagara Mohawk, supra* (1954), where water rights in a navigable stream were held unaffected by the provisions of the Federal Power Act.

Since the taking in the case at bar is for flood control and water power there is no conflict with these Ninth Circuit cases which hold, at most, that there can be no consideration of power potential where Congress has authorized a real navigation project. Even if the development of Clark Hill were an exercise of the navigation easement, the reasoning of these opinions that power adaptability may not be considered has been overruled by the cited opinions of the Court.

5. The decision below turns on its own facts and has little potential application to other cases. The determination of just compensation is essentially a factual matter, seldom calling for review here. Here *Twin City* owned the heart of one of the two best undeveloped hydro electric sites east of the Mississippi. (R. 144.) Its property could have been economically developed for water power purposes alone or in combination with other properties. (Petition 4a; R. 72.) At the time of taking, it was being actively sought by private capital as well as by the Army Engineers.

Savannah River Electric v. F. P. C., 164 F. (2d) 408. (Petition 5a.) The fifty-year history of this property shows a continuous interest in its development for water power purposes. Concurrent findings establish a factual situation favorable to a degree unlikely to be present in any other case.

CONCLUSION

For these reasons the Respondents respectfully ask that the Petition be denied.

DAVID W. ROBINSON,
Counsel for the Respondents.

Columbia, S. C.,
December 16, 1954.